SUPREME COURT, U. S. IN THE JUL 25 19

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-5148

SAMUEL SHEFFIELD,

Petitioner,

—v—

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
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Docket No.

SAMUEL SHEFFIELD,

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QUESTION PRESENTED

Whether, in the instant case, the activities of petitioner Sheffield, coupled with the knowledge possessed by the police officers gave rise to a situation in which it was proper for the officers to attempt to stop and question him?

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to review an April 4, 1973 decision of the Supreme Court of New Jersey reversing a judgment of the Superior Court, Appellate Division and reinstating the judgment of conviction originally entered by the trial court. After denial of a pretrial motion to suppress evidence, petitioner pleaded not guilty to accusation number A-3593-70, filed March 18, 1971, charging him with possession of a narcotic drug contrary to N.J.S. 2A:21-20 (a) (1). After waiver of trial by jury, petitioner was tried and found guilty by the Honorable Joseph B. Sugure, J.S.C. on September 29, 1971. The court imposed a term of two years probation and fined the petitioner two dollars per week.

At the hearing on the motion to suppress evidence, the following record was developed. At approximately 3:30 P.M. on

February 2, 1971 Detectives Gordon El, McNulty and Delaney of the Newark Narcotics Squad were patrolling a high crime area of Newark, New Jersey in plain clothes and in an unmarked car. They observed petitioner, known to them as a narcotics pusher and dealer from their past experience in the area, walking along Bruce Street and Fifteenth Avenue (Ta*5-23 to Ta 6-3; Ta6-12 to 18; Ta26-15 to 20). When the car was approximately three feet from Sheffield, Detective Gordon El, without identifying himself, called to him by name to come over to the car. Sheffield ignored him and went off in the opposite direction toward a tavern. At this point Gordon El got out of the car and, as he approached him from behind, observed Sheffield go to his mouth with his right hand (Ta 7-3 to 5). Gordon El could not see the complete gesture because petitioner's back was turned; he was also unable to see exactly what Sheffield had stuffed into his mouth but he did notice that petitioner was unable to speak (Ta 14:12-15). However, Gordon El testified from his experience on the narcotics squad that swallowing narcotics is a common method of attempting to avoid arrest utilized by narcotics law violators (Ta 11-4 to Ta 12-16).

After observing the above gesture, Gordon El again called Sheffield who continued to ignore him and proceeded in the opposite direction. When Gordon El caught up to him, Sheffield pushed him away (Ta 7-10 to 14). A struggle ensued; Gordon El then attempted to arrest Sheffield and petitioner was knocked to the ground (Ta 7-15 to 16; Ta 9-6 to 13). As Sheffield fell, Gordon El observed an object fall from his mouth which upon inspection turned out to be fourteen bags of heroin (Ta 9-21 to 25; Ta 10-10 to 18).

At the suppression hearing, Gordon El testified extensively (Ta 6-12 to 20; Ta 18-12 to 19-2; Ta 24-2 to 27-15) concerning his knowledge of the petitioner. Gordon El stated that petitioner was a known narcotics dealer in the area, that he himself had arrested petitioner once before for possession of narcotics, that petitioner had been in the Narcotics Squad office several times and that petitioner was a "card carrying" addict. On recross-examination, Gordon El altered his testimony to the effect that although he had not arrested petitioner he had been in petitioner's prescence

*Ta refers to the transcript of the motion to suppress held on April 8 and 30, 1971. T refers to the transcript of the trial held on September 29, 1971.

while he was being arrested by someone else. Gordon El also based his knowledge of Sheffield on his familiarity with the narcotics traffic in the area.

Fred Purcell, an identification officer for the Newark Police Department and custodian of the arrest records, was the only defense witness (Ta 28-5 to 19). Petitioner's arrest record was introduced into evidence and it revealed that he had never before been arrested on a narcotics offense (Ta 29-13 to 19).

In denying the motion to suppress, the court specifically accepted Gordon El's account of the events in question despite the ambiguity surrounding defendant's prior arrests. He found that Gordon El knew Sheffield regardless of his prior narcotics arrests or lack of them; he also found that Sheffield placed something in his mouth while fleeing. The court held that in a high narcotics area, petitioner's actions in failing to respond to the officer's call and gesturing towards his mouth while quickly walking away constituted probable cause (Ta 33-5 to 34-13). Accordingly, the motion to suppress was denied.

Sheffield was subsequently brought to trial and found guilty of possession of narcotics. At trial, defense counsel stipulated that the substance which fell from the defendant's mouth was heroin and that the chain of possession was unbroken (T3-3 to T4-6). Detective Hugh McNulty of the Newark Narcotics Squad testified and his account paralleled that related by Gordon El at the suppression hearing. The evidence was then introduced and upon that record, the defendant was found guilty.

On September 28, 1972 the New Jersey Superior Court, Appellate Division, reversed the trial court and held that the police, under the circumstances of the case, had no right to attempt to stop and question the defendant. Relying upon *Terry v. Ohio*, 392 *U.S.* 1 (1968) and *State v. Dilley*, 49 *N.J.* 460, 467-468 (1967) the Appellate Division held that highly suspicious activities on the part of the defendant were a prerequisite to the right of the police to stop and question him in the manner employed in this instance.

On certification, the Supreme Court of New Jersey reversed the Appellate Division and reinstated the judgment of the trial court. The opinion of the Supreme Court of New Jersey is reported in 62 *N.J.* 441 (1973). Emphasizing the importance of police expertise in the narcotics area, the Supreme Court held that the police conduct in question was reasonable and that there

was nothing illegal in the mere *attempt to question* Sheffield. The Court specifically rejected the "highly suspicious circumstances" limitation on the right to question. Relying on the recent decision of *Adams v. Williams*, 407 *U.S.* 143 (1972), the court stressed the role of the police in crime prevention and detection and stated that when the police officer's experience indicated that some investigation is in order, although the citizen's behavior falls short of being highly suspicious, street interrogation may be the most reasonable and proper course to pursue. Noting that any evidence of harrassment was absent in this case, the court concluded that mere field interrogation does not amount to detention in the constitutional sense unless the police officer curtails the individual's freedom of movement.

ARGUMENT
POINT I

NO DETENTION OR SEIZURE OCCURRED IN THIS CASE AND NO CONFLICT OF DECISIONS EXISTS AS TO THE CONSTITUTIONAL PROPRIETY OF BRIEF, ON THE STREET QUESTIONING OF CITIZENS BY POLICE DURING THE COURSE OF THEIR INVESTIGATORY DUTIES.

In urging the issuance of a writ of *certiorari*, peitioner alleges a conflict among decisions of the various jurisdictions which have treated the issue of on the street police attempts to question citizens. However, an analysis of the cases cited by petitioner indicates that such a conflict is non-existent. Petitioner relies upon inapplicable stop and frisk cases and misinterprets dicta in *Terry v. Ohio*, 392 *U.S.* 1 (1968) in his attempt to characterize the circumstances of this case as a seizure violative of the Fourth Amendment.

To support his assertion that a seizure occurred at the point when Gordon El called out to petitioner, he states (Petitioner's brief for *certiorari* at 20) that the trial court found that he was effectively stopped or apprehended by the officer. That "seizure" refers only to the incident which took place after petitioner walked away from Gordon El for the second time and gestured to his mouth. Contrary to petitioner's assertion, the trial court did not find that Gordon El had seized petitioner by a mere attempt to question him (Ta 33-11 to 20).

Terry, supra, at 20 n. 16 indicated that a seizure in the constitutional sense occurs only when a police officer restrains the liberty of a citizen through physical force or a show of authority. Measured against this standard, the encounter involved herein may more properly be called a police-citizen contact instead of a seizure or detention. Such a distinction highlights the inapplicability of the numerous stop and frisk cases relied upon by petitioner in his petition for writ of *certiorari*.

Case law dealing with investigatory police-citizen contacts does not conflict with the recent decision of the New Jersey Supreme Court in the instant case. The courts of California, New York and several other jurisdictions have authorized the type of verbal inquiry utilized by the officers in this case and have articulated standards similar to that expressed by the New Jersey Court.

The Supreme Court of California approved similar police conduct in *People v. Siegenthaler*, 7 *Cal.* 3*d* 465, 499 *P.* 2*d* 499, 103 *Cal. Rptr.* 243 (1972). There, police officers attempted to question individuals who fled and dropped certain objects in the process. The court held that no infringement of protected rights occurred in the initial attempt to question. *People v. Manis*, 74 *Cal. Rptr.* 423, 268 *Cal. App.* 2*d* 653 (Ct. App. 1969) also supports brief questioning as does *People v. Sartain*, 73 *Cal. Rptr.* 799, 268 *Cal. App.* 2*d* 486 (Ct. App. 1968). In *Manis*, the court construed *Terry* to support questioning when an individual's conduct, in light of the area and circumstances, suggests that investigation is appropriate. 74 *Cal Rptr.* at 427-429. Accord, *People v. Henze*, 61 *Cal. Rptr.* 545, 547, 253 *Cal. App.* 2*d* 986 (Ct. App. 1967).

Batts v. Superior Court of Orange County, 100 *Cal. Rptr.* 181, 23 *Cal. App.* 3*d* 435 (Ct. App. 1972) clearly distinguished between police-citizen contacts having nothing to do with crime but from which evidence of crime may result and on the street detentions:

> Innumerable contacts between police and citizens are intrusions into the citizen's privacy but these contacts have nothing to do with suspicion of criminal activity. They arise from the police officer's duty to maintain peace and security, to protect citizens from harm or annoyance and to do all those innumerable miscellaneous tasks which society calls upon the police to do which have nothing to do with the detection of crime. 100 *Cal. Rptr.* at 183.

Respondent submits that a police officer's obligation to keep informed of street activity mandates just the kind of verbal inquiry recognized by the California courts. See also *Young v. United States*, 435 *F.*2*d* 405, 408 (D.C. Cir. 1970); *Gaines v. Craven*, 448 *F.*2*d* 1236 (9th Cir. 1971); *United States v. Riggs*, 347 *F.Supp.* 1098 (E.D.N.Y. 1972); *State v. Fish*, 289 *Minn.* 163, 159 *N.W.* 2*d* 786 (1968); *State v. Lewis*, 80 *N.M.* 274, 454 *P.*2*d* 360 (1969).

The premise underlying many of these decision is well stated by the New York Court of Appeals in *People v. Rosemond*, 26 *N.Y.*2*d* 101, 257 *N.E.*2*d* 23, 308 *N.Y.S.*2*d* 836 (1970) which recognized that many grounds other than a reasonable suspicion of criminal behavior will justify such limited police inquiry as

exemplified by the instant case. Knowledge and awareness of street activity is essential to competent and effective police work. Often, what is unusual enough to call for an inquirty must rest in the professional experience of the police. 26 *N.Y. 2d at 104.*

A narcotics detective is a trained professional. Undercover work is vital to his task of detecting and investigating possible violations of New Jersey's narcotics laws. In the course of this work officers are often confronted with seemingly innocuous situations. In this instance, three experienced narcotics detectives with an intimate knowledge of both the narcotics traffic in general and its aberrations in this particular area were cruising in a high crime area of Newark. They recognized petitioner as a local narcotics pusher, if not from his prior record, then from their knowledge of the neighborhood drug traffic.

The court, at the motion to suppress, specifically found that the petitioner was known to the officers, whether from prior arrests or not (Ta 33-9 to 11). It is the job of narcotics detectives to know the local drug activity; obviously, one of their functions is to know the identity of the local addicts, pushers, and dealers. As in this case, spotting a person like petitioner often leads them to investigate. Initiation of this type of investigation usually begins with the questioning of the individual involved. *People v. Manis, supra* 74 *Cal. Rptr.* at 428. To forbid this type of police work, as petitioner urges, would choke off a vital tool in the investigation of narcotics activity and would be tantamount to completely discounting the importance of police expertise and experience in this area. Noteworthy is the restraint exercised by the police under the circumstances. Initially, Gordon El did not try to stop, arrest, or search the petitioner. He did not even alight from the car until petitioner ignored his call and walked off. Respondent urges that Detective Gordon El had both the right and the obligation to attempt to question petitoner.

By the use of inapplicable cases dealing with stop and frisk and unreasonable police conduct *United States v. Davis,* 459 *F.2d* 458 (9th Cir. 1972); *United States v. Hostetter,* 295 *F. Supp.* 1312 (D. Del. 1969); *People v. Thomas,* 16 *Cal. App.* 3d 231, 93 *Cal. Rptr.* 877 (Ct. App. 1971); *Commonwealth v. Berrios,* 437 *Pa.* 338, 263 *A.2d* 342 (1970); *Commonwealth v. Hicks,* 434 *Pa.* 153, 253 *A2d* 276 (1969); *State v. Rater, 453 P.2d* 680 (Ore. 1969); *People v. Lingo,* 3 *Cal. App.* 3d 661, 83 *Cal. Rptr.* 755 (Ct.App.

1970), petitoner has attempted to base *certiorari* jurisdiction on an alleged conflict of decisions treating the issue involved in this case. Additionally, petitioner has distorted the issue at bar both in his petition and in the courts below. Petitioner labels the issue involved as an "on the street stop and detention of a person" (Petitioner's brief for *certiorari* at 2) for investigatory purposes. This is a total mistatement of the facts as they occurred. At issue is a mere *attempt to question* an individual know to the police as a narcotics pusher from their experience in the area. No stop, seizure or detention existed in the mere attempt to question petitioner. Because petitioner has distorted the issue and relied upon inapplicable cases, respondent urges that the writ of *certiorari* be denied.

POINT II

THE PROPRIETY OF BRIEF ON THE STREET INVESTIGATORY QUESTIONING DOES NOT POSE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

In order for a writ of *certiorari* to issue, petitioner must raise a substantial constitutional issue before this Court. The question presented must not be devoid of merit nor must it be foreclosed by previous judicial decisions. *Zucht v. King*, 260 *U.S.*174 (1922); *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 *U.S.* 390 (1952). In the past, *certiorari* has been granted in criminal cases involving vital constitutional issues affecting the administration of criminal justice, not merely the individual litigants. *Gideon v. Wainwright*, 372 *U.S.*335 (1972); *Cornley v. Cochran*, 369 *U.S.* 506 (1962); *Gilbert v. California*, 388 *U.S.*263 (1967); *Pointer v. Texas*, 380 *U.S.*400 (1965) and *Aguilar v. Texas*, 378 *U.S.*108 (1964) are representative of the type of cases deserving adjudication by this Court. Respondent respectfully submits that the instant case presents no issue of similar constitutional magnitude and that a writ of *certiorari* should, therefore, be denied.

The courts have adopted flexible guidelines governing police practices in this area. Effective law enforcement policies mitigate against codification or precise delineation of the many situations demanding police inquiry. The best method of determining the propriety of such inquiries, which have been taken almost as a matter of course by the New York Court of Appeals, is a case by case determination. *People v. Rosemond, supra*, at 104. *People v. Rivera*, 14 *N.Y.* 2*d*441, 445, 201 *N.E.*2*d* 32, 252 *N.Y.S.*2*d* 458 (1964), *cert.* denied, 379 *U.S.* 978 (1965); *Adams v. Williams*, 407 *U.S.*143 (1972); *Young v. United States*, 435 *F.*2*d* 405, 408 (D.C. Cir. 1970).

Former Chief Justice Warren warned against a rigid application of the exclusionary rule to situations not involving unreasonable police conduct. Not to do so, according to the former Chief Justice, would "exact a high toll in human injury and frustration of efforts to prevent crime." 392 *U.S.* at 15. Since the instant record reveals only legitimate and restrained police activity, no important constitutional question appears.

Despite petitioner's attempt to create a constitutional question by distorting the issue, respondent submits that a thorough examination of the record in this case reveals a complete lack of any substantial constitutional issue, as well as an absence of conflicting decisions in this area.

CONCLUSION

For the reasons stated herein, respondent respectfully urges that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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